

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
KELVIN GUDE,

Complainant,

v.

DOCKET NO. 08-BEM-02625

JENALYN, INC.

Respondent

Appearances: David Green, Esq. for Complainant
John E. Scannell, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On September 15, 2008, Complainant, Kelvin Gude filed a complaint against his former employer, Jenalyn, Inc., alleging that he was compensated unfairly in his position as a telemarketer on account of his race and gender. He specifically alleged that he was paid a lower hourly rate than other telemarketers with less experience and that he was subjected to a racially hostile work environment. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts to conciliate the matter were unsuccessful and the case was certified for hearing. On March 10, 2010, Complainant amended his complaint to add Alan Frerichs, the president and sole shareholder of Jenalyn, as a party Respondent, alleging that

Jenalyn had been involuntarily dissolved as a corporate entity in May of 2007. The amended Complaint also stated a claim for discriminatory termination. The Amendment was allowed by Order of the Hearing Officer on July 28, 2010. A hearing was held before the undersigned hearing officer on March 9, 2011. Having reviewed the record and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Kelvin Gude, is an African American male who resides in Boston, Massachusetts. Complainant was hired to work at Jenalyn as a telephone solicitor on June 2, 2008, by phone room manager, Michael Marchione. Complainant was hired at the starting rate of \$8.00 per hour to work the 4:00 pm to 8:00 pm shift for a total of 20 hours per week.
2. Alan Frerichs was the President and General Manager of Jenalyn, Inc. for some 20 years. (Ex. C-5) Jenalyn was located in Quincy, Massachusetts. Documents from the Massachusetts Secretary of State's Office list Frerichs as the President, Secretary and Treasurer of Jenalyn and note that the corporation was involuntarily dissolved on May 31, 2007. (Ex. C-4) Frerichs testified that Jenalyn's business was generating profit from the sale of newspaper subscriptions by telemarketing calls. He testified that as of December, 2009, the company is no longer in business.
3. According to Frerichs, the starting salary for all telemarketers at the time was \$8.00 per hour and that both Complainant and his female comparator started at this rate of pay in June of 2008. The telemarketer's job was to contact potential customers to sell them home delivery of the Boston Herald and other local newspapers. Telemarketers were

given a script to follow and productivity was measured by the number of sales made and orders written. The number of calls made by a telemarketer was tracked by an auto-dialing system that also monitored time away from the phone. Frerichs testified that turnover in the business was very high and that he processed some 500 to 800 W2s per year. In his twenty years in the business he had hired some 12,000 to 14,000 new employees.

4. Sometime during his first week on the job, Complainant plugged in his cell phone to charge it and short-circuited the computers. He testified that Paul Frerichs, brother of the owner, yelled at him calling him an idiot and threatening to throw his phone out the window if he did this again. Complainant did not know at the time that Paul Frerichs was the owner's brother. He testified that he told his supervisor Marchione that he felt threatened by Frerichs' reaction and Marchione responded, "he's not over busing yet." After discussing this comment with his father, Complainant believed the comment to be a racial slur and became infuriated.
5. Marchione testified that he witnessed this incident as he was leaving at the end of the shift and Complainant ran up to him asking "what's up with your guy Paul, he threatened to throw my phone out the window?" Marchione testified that he thought Complainant was insinuating that his race was an issue and Marchione responded, "I don't know if he never got over busing or is just a big mouth." He told Complainant not to worry about Frerichs because Complainant did not work for Frerichs. Marchione testified that it was late and he just wanted to leave. He told Complainant to just do his job, as he did not want to see Complainant get into a fight with the owner's brother. Complainant had no further incidents with Frerichs. While Complainant testified that Marchione commented

at that time that he avoids going to Roxbury at night, I credit Marchione's testimony that he made this comment at another time in a conversation with Complainant when they were discussing a job Marchione had many years earlier. Marchione testified that he and Complainant got along and were friendly and frequently discussed their common interest in music. I do not find that this conversation was related to the incident with Paul Frerichs or that it was racially hostile.

6. In August of 2008, Complainant discovered that a female co-worker who had started working about the same time he did had received a one dollar per hour raise and was making \$9 per hour. According to Complainant, he mentioned to Marchione that he wanted a raise or more hours and Marchione told him there was nothing he could do about the pay disparity. Complainant testified that Marchione had promised him a raise if his productivity rose to the level of his prior job and he felt Marchione did not respect him.
7. Marchione testified that he always tells new hires that their rate of pay will be bumped up to \$9 per hour if they average at least one sale per hour. Complainant had not achieved that level of productivity. Marchione testified that Complainant was not punctual and often came to work late and left early. According to Marchione, Complainant asked for a raise his last week of employment and Marchione discussed Complainant's production with Frerichs. He stated that Complainant was a low producer and he sent a note to Complainant's computer telling him that he was one of the lowest producers in the room with an average of .49 or half a sale per hour. He advised Complainant that the best way to get his production up was to show up on time and not leave early.
8. Marchione testified that when he asked Complainant if he had received the message, Complainant stared him down, angrily accused him of making his low production

“public” and stated, “I should have *your* job.” Marchione asked Complainant to repeat that statement and then told him to take the rest of the week off. Marchione then discussed Complainant’s productivity and tardiness with Frerichs and the decision was made to terminate Complainant’s employment. At the time Complainant had already filed a discrimination charge at the MCAD, but Respondents had not yet been notified of the filing. On Friday, September, 19, 2008, the notice of termination was delivered to Complainant by a co-worker with his final pay-check. Marchione testified that this was not unusual because Complainant often requested that the female co-worker deliver his pay check because he worked the 4-8 shift.

9. Frerichs testified that productivity could be measured daily from the auto-dialing system and that he reviewed these productivity reports with Marchione on a weekly basis. From the auto-dialer reports he created a spread sheet that compared Complainant’s productivity that of his female comparator. The numbers demonstrated that Complainant’s female comparator was given a \$1 per hour raise in August because her productivity had increased and exceeded Complainant’s. Frerichs testified that the attendance records also demonstrated that Complainant’s attendance was not reliable and there were only three weeks when he managed to work his scheduled 20 hours. Frerichs never met Complainant, but that he did discuss Complainant’s low productivity with Marchione.
10. Donald Owens is an African American employee of Respondent who has worked for Respondent since 1994 in various capacities, including phone room manager and lead solicitor. Owens stated that he observed Complainant’s performance and had the impression that Complainant did not want to do the job. Owens testified that he observed

Marchione instruct Complainant on how to improve his sales techniques. He noted that Complainant had a perfect voice for phone sales and could have done very well but he was unwilling to follow the phone room manager's direction and was resistant to supervision and confrontational. He testified that while he did not personally follow Complainant's attendance, everyone knew everyone, and his attendance was a source of conversation in the room. He stated that in the 15 years he worked for Respondent he experienced one racial incident where a fellow employee used a racial epithet, and after he complained to the boss, he never had another problem. He observed no conduct directed at Complainant by Marchione that could be construed as racist or racial. He was not present for the incident with Paul Frerichs that occurred during Complainant's first week of employment.

11. Complainant's female comparator testified that she delivered Complainant his pay check a number of times at his request and that they would meet in Quincy Center. She stated that he told her about the incident with Paul Frerichs threatening to throw his cell phone out the window but stated he was not upset when he relayed this incident to her. She stated that she was punctual, followed the scripts and was meeting her quotas, and presumed that was why she got the \$1 per hour raise. She stated that she and Complainant "messed around" a couple of times and he asked her to provide a statement to the Commission in his support, but she never did. She also testified that in return for her support he offered to give her money if he won his case.

III. CONCLUSIONS OF LAW

Complainant has alleged that he was subjected to a hostile work environment based on his race, subjected to disparate treatment in the form of unequal pay and terminated from his employment with Respondent on account of his race. A claim for a racially hostile work environment may succeed if the conduct complained of is based on the employee's membership in a protected class, the conduct is sufficiently severe and pervasive to alter the employee's conditions of employment and create an abusive work environment, and the employer, once on notice, fails to take prompt remedial action. Beldo v. UMass Boston, 20 MDLR 105, 111(1998), *citing* Richards v. Bull H.N. Information Systems, Inc. 16 MDLR 1639, 1669 (1994).

Complainant has cited one incident where he crashed the computer system and Paul Frerichs, the owner's brother, threatened to throw his cell phone out the window if he ever plugged his cell phone in to recharge again. There was no evidence that this comment was based on Complainant's race or that Frerichs treated Complainant any differently than he would have treated someone else who had crashed the system. Complainant did not know at the time that Frerichs was the owner's brother. I credit Marchione's testimony that when Complainant asked about Frerichs, Marchione told him that he need not worry because Frerichs was not his supervisor and not to get into it with him. While Complainant claims that Marchione injected race into the discussion, Marchione testified credibly that Complainant implied that race was an issue, prompting Marchione to respond he didn't know if Frerichs had not gotten over busing or just had a big mouth. Marchione testified that Paul Frerichs was someone who spoke his mind. At any rate, there were no further

incidents with Frerichs and no evidence of ongoing hostility or repercussions from the incident.

Complainant testified about one other comment that purportedly involved race, Marchione's comment to him that he did not feel comfortable going to Roxbury late at night. Complainant and Marchione had a friendly relationship and often discussed their mutual love of music. I credited Marchione's testimony that he made this comment in a companionable discussion at a later time. It was not related to the incident with Frerichs and was not racially hostile. Nothing more came of the incident with Frerichs and I conclude that it did not create a racially hostile work environment. Complainant has not demonstrated that he was subjected to abusive working conditions on account of his race.

In order to prove discrimination based on disparate treatment Complainant must prove that Respondent's refusal to increase his rate of pay and its decision to terminate his employment, were in fact undertaken with discriminatory intent and state of mind. Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001). With respect to Complainant's claim of disparate treatment based on unequal wages, Respondent has demonstrated that Complainant did not merit a raise because he was not meeting the performance metrics as measured by the auto dialing system. While he may have been meeting minimum performance criteria, sufficient to establish a prima facie case, the auto dialer records support Respondent's testimony that he did not meet the quota for a raise in hourly rate, and that his female comparator was exceeding his performance. Complainant produced no evidence other than his own self-serving testimony to show that this was untrue. Indeed, it is clear that part of the reason for Complainant's diminished performance was his inconsistent and unreliable attendance which others in the work place were aware of. Complainant made much of the fact that he

had prior telemarketing experience and should have been paid more based on that experience, but that assertion only serves to highlight that his performance was lackluster despite his much touted experience.

The incident that led to Complainant's termination involved his angry reaction to a private computer message Marchione sent to him regarding his need to improve his performance if he wanted a raise. Complainant essentially mocked Marchione stating that he should have Marchione's job, implying that he would do a better job as supervisor of the room. Marchione considered his actions to be insubordinate and asked Complainant to leave and take the rest of the week off. Marchione then discussed Complainant's performance with the owner, Alan Frerichs, and the decision was made to terminate his employment based on his deficient performance and unreliable attendance. I credited the testimony of Frerichs and Marchione that this was the reason for Complainant's termination, and I conclude that the termination was not motivated by Complainant's race and color. Based on all of the above I conclude that Respondent did not violate G.L. c. 151B.

IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, I hereby Order that the complaint in this matter be dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 18th day of January, 2012.

Eugenia M. Guastaferr
Hearing Officer

